

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RUSSELL L. DAVENPORT

Claimant

VS.

NEIGHBORS & ASSOCIATES

Respondent

AND

**ACCIDENT FUND INSURANCE CO.
OF AMERICA**

Insurance Carrier

Docket No. 1,047,295

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the February 5, 2010, preliminary hearing Order entered by Administrative Law Judge Thomas Klein. William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Matthew J. Schaefer, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) ordered respondent to pay claimant temporary total disability benefits from the date Dr. Stein placed restrictions on claimant. Dr. Brian Ipsen was authorized to be claimant's treating physician.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 3, 2010, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent contends that claimant has not proven that he suffered a compensable injury that arose out of and in the course of his employment.

Claimant asks that the ALJ's order be affirmed.

The issue for the Board's review is: Did claimant suffer personal injury by accident that arose out of and in the course of his employment with respondent?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant worked for respondent as a maintenance man. He testified that on July 21, 2009, he was trying to get ready for the day. He had gotten to work a little before 6 a.m., and the first thing he did was start cleaning the shop, which is his standard routine. At about 6:30 a.m., while he was pushing his tool box, he turned to go in the direction of a battery he was going to move and felt a pain in the middle of his back. He said the tool box was five foot long and four foot tall. It contained hand tools, cordless drills and lights, and it was heavy.

Claimant reported his injury the same day to his supervisor, Marvin Dove. He told Mr. Dove he had hurt his back pushing his tool box. Mr. Dove gave him some Ibuprofen and told him to go back to work. Claimant tried to return to work but was unable to do so. He worked for about half a day, and his pain increased as he worked. He again reported his back condition to Mr. Dove and told him he was going home. Mr. Dove did not ask claimant to fill out an accident report and did not offer to send him to a doctor.

When claimant went back to work the next day, he reported to Mr. Dove that his back was messed up and asked to see a doctor. Mr. Dove told him he could see a doctor but did not tell him which doctor to see. Mr. Dove told him to file the claim with his personal health insurance and that Mr. Dove would pay the deductible. Claimant went to see Dr. Phillip Bortmes on July 22, 2009. Dr. Bortmes' medical record of that date indicates that claimant gave a history of hurting his back the morning of July 21.

Dr. Bortmes sent claimant for an x-ray. When claimant went to the hospital for the x-ray, he told them to bill it to his personal health insurance. He also told them he had injured his back at work. Hospital personnel said they were not sure that would work, and they flagged his file. Claimant reported this to Mr. Dove, and they had a discussion of whether to file this under workers compensation. Claimant specifically told Mr. Dove he wanted it filed under workers compensation.

Claimant returned to Dr. Bortmes on July 28. The medical note of that date indicates that claimant gave a history of pushing a cart at work. Mr. Dove took claimant to that appointment. From that time, Mr. Dove attended all claimant's doctor's appointments as if it were a workers compensation case.

During cross-examination, claimant was asked to read his response to a question as to how his accident happened asked at a discovery deposition he gave on October 30, 2009. Claimant testified:

I headed over by a forklift that I had been working on, just so I didn't have to walk all the way across the shop to get tools and walked back over to the forklift, walked to the tool box and back and forth, and it was on wheels so I wheeled it back over close to the forklift. It's got big steel plate on top of it and work bench on top of it and I can set my stuff where I don't have to walk in the shop with it.¹

At the preliminary hearing, claimant testified that he had used the tool box to work on a forklift the day before and had left the tool box in a caged area, where it should not have been, the night before when he left work. Claimant said he has a boss that is very tidy, and the reason he was pushing the tool box on July 21, 2009, was to clean up his work area.

Dustin Wilson is an employee of respondent and is the lead man over the paint and blast area. He knows claimant but is not his supervisor. He made the following written statement about claimant's injury:

I Dustin Wilson observed Russell Davenport early Tuesday morning 7/21/2009 standing in a strange position. I asked him what was wrong with him and he said, "last night I was turning to set something I was holding down and got a kink in my back, you know how it is."²

Mr. Wilson testified he was asked by Mr. Dove to write out the above statement after Mr. Wilson told him that claimant said he had injured his back at home. Mr. Wilson said he and claimant had the conversation at 7 or 7:30 a.m. on July 21, 2009. Mr. Wilson could not remember what day he told Mr. Dove what claimant had said, but it was after claimant had reported his work-related injury. Mr. Wilson said he told Mr. Dove about claimant's statement because although he had not heard that claimant had hurt his back, he made that assumption. Mr. Wilson testified that after he gave Mr. Dove the information about claimant's statement, Mr. Dove said, "that's good information that he needs."³ Later, Mr. Dove asked Mr. Wilson to write out a statement. Mr. Wilson could not type, so Mr. Dove typed the statement and Mr. Wilson signed it. Mr. Wilson could not remember when this statement was typed and signed but thought it was about a week later.

Mr. Wilson said he told Mr. Dove about claimant's statement because he thought it was the right thing to do. He said he wanted to make everything right for everybody else because respondent has a safety incentive bonus and if someone gets an on-the-job injury, the other employees suffer because they would not get the safety bonus. Mr. Wilson agreed that he did not put in the report the time he and claimant had the alleged

¹ P.H. Hearing (Feb. 3, 2010) at 24-25.

² P.H. Hearing (Feb. 3, 2010), Resp. Ex. 1.

³ P.H. Hearing (Feb 3, 2010) at 51.

conversation. Neither did he put in the report that claimant appeared to be in pain. Mr. Wilson said claimant did not appear to be in pain when he made the statement that he had hurt his back at home.

Mr. Wilson said he first was told by his supervisor, Mike Dreese, two, three or four days after July 21, that claimant was claiming to have injured himself at work. Mr. Wilson said he noticed that claimant had not been at work for several days, so he asked Mr. Dreese why, just being curious, after which Mr. Dreese told him claimant was claiming a work-related accident. Mr. Wilson admitted that it would not be unusual for claimant to be gone several days because he worked at more than one facility. He said he had already spoken with Mr. Dove about claimant's statement before he was told by Mr. Dreese that claimant was claiming a work-related injury. Yet Mr. Wilson said it was probably two to three weeks after July 21 that he spoke with Mr. Dove about claimant's alleged statement. And at that time he did not know anything was going on. When he spoke with Mr. Dove, Mr. Wilson said he just assumed claimant was claiming a workers compensation injury, but he was not specifically told that was the case until he spoke with Mr. Dreese about it. Despite giving this inconsistent time line, Mr. Wilson said he spoke with Mr. Dove before he spoke to Mr. Dreese and learned for the first time from Mr. Dreese that claimant was alleging his back injury was work related.

Mr. Wilson testified that the night before July 21, 2009, he did not see the tool box in the caged area where claimant said he had left it. Mr. Wilson agreed that the shop has a strict boss who is very tidy. Mr. Wilson said that workers normally clean up at quitting time so everything is clean when they get to work in the morning.

Mr. Wilson agreed that his brother and claimant had a previous falling out over a girl. He testified there was animosity between his brother and claimant, but that would not be enough for him to lie under oath.

Claimant testified that he did not hurt himself at home. He did not tell anyone, specifically Dustin Wilson, on July 21, 2009, that he had hurt himself at home the night before. He did not have a prior back condition that resulted in the symptoms he now has. He has had a previous neck problem but not a low back problem.

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁴ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁵

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁶

This Board Member, as a trier of fact, must decide which testimony is more accurate and/or more credible.⁷ Where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's witness testify in person. In granting claimant's request for medical treatment and temporary total disability benefits, the ALJ apparently believed his testimony over the testimony of respondent's witness. The Board concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify.

This record presents a close question. Because preliminary benefits were awarded to claimant, the ALJ obviously found claimant's testimony to be more credible than that given by Mr. Wilson. After reading and considering their respective testimony, this Board Member agrees with the ALJ that claimant presents the more credible description of events. Mr. Wilson's testimony is inconsistent. Also, his recollections of the dates of his conversations with Mr. Dove and Mr. Drees are quite vague, ranging from days to weeks apart. Yet he purports to remember exactly the date of his conversation with claimant.

⁴ K.S.A. 2009 Supp. 44-501(a).

⁵ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

⁶ *Id.* at 278.

⁷ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

Based upon the record presented to date, claimant has met his burden of proving his back injury resulted from an accident arising out of and in the course of his employment.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁹

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated February 5, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2010.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

⁸ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. ___, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁹ K.S.A. 2009 Supp. 44-555c(k).